
Commercial Remedies: Identifying Themes and Controversies

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1.1 Remedies and their Importance

This is a volume on commercial remedies. Much of the genius of English commercial law rests on the success of its courts in delivering appropriate remedies. But success has never equated with complacency, and many of the issues underpinning the remedial framework are contested. This volume focuses on the controversies, with the goal of contributing to the debate which is essential to ensuring that the law is in the best possible state for commercial parties.

Common law jurisdictions are often caricatured as remedial rather than rights-based.¹ As with many caricatures, there is an essential truth here which makes the study of remedies in these jurisdictions vitally important. The necessary examination is not easy, however. The task is harder still for the judges who have, historically, borne the primary responsibility for building the common law legal regime from the ground up. This explains the focus of this collection of essays on unravelling some of the more challenging controversies.

What makes the task difficult is not simply the exacting process of building any coherent regime in a bottom-up way, somehow always balancing the pressure to deliver a regime which is certain and stable against the pressure to deliver one which is fair and flexible. There are other still greater difficulties. For a start, it is surprisingly difficult to explain exactly what is meant at law by a 'remedy'. That task is not made easier by confining the examination to commercial contexts, as this volume does. Even if this can be settled, once a regime takes a bottom-up remedial

¹ See William Blackstone, *Commentaries on the Laws of England*, VI, p 23, 1 Co Inst 95b, advancing the notion also expressed in legal maxims that 'where there is no remedy, there is no right': i.e. our rights are essentially measured by our remedies.

starting point, it seems nigh on impossible to hold to some clear and overarching useful meta-principles, and shake loose from an irresistible urge towards the pragmatic response. And if such a change in approach were managed, too many of the foundational principles underpinning commercial contractual engagements are still deeply contested. A coherent and stable regime cannot be built on shaky foundations. Finally, even assuming these foundational principles were settled, they would still necessarily come into conflict with each other, requiring difficult balancing exercises from the judges. All these various difficulties – the nature of a remedy, the drive to pragmatism, the challenge of conflicting foundational principles, and the inescapable need to balance competing goals – run as persistent threads through all the chapters in this volume. In this introductory chapter, however, something should be said to help draw out the difficulties which are in the sightlines.

1.2 The Nature of a Remedy

Put at its simplest, a remedy is ‘a cure for something nasty’;² it is a means of righting an undesirable situation. Legal maxims reinforce the notion that where there is no remedy, there is no right: our rights are measured by our remedies. Some rights merit better protection than others, we often say, suggesting that all depends on the nature of the right itself. But the common law has grown up from responses to facts before the court; it has grown up thinking first about appropriate remedies. Articulating the quality of rights is a descriptive exercise which necessarily comes later. True, however, once the description has stabilised, it aids analysis to start from the right and its appropriate categorisation, and move from there to the remedy which will arise on its infringement.

This later notion of rights generating remedies is implicit in the description of contract given by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*:

[A] contract is a source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done . . . Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach.³

² Peter Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 OJLS 1, 9.

³ [1980] AC 827 (HL) 848–49.

This notion of primary and secondary obligations, with the secondary obligations being remedial, has dominated much of the scholarship in contract and tort in the recent past.⁴ Yet even on its own terms this falls far short of describing the rich breadth of the remedial landscape. Moreover, even the mechanics may be flawed. Later scholars have pointed out, with some merit, that the remedy is hardly an obligation, at least as we normally think of obligations, and might be better described as a liability.⁵

But this too does not seem to quite capture the breadth of the issues in play. Peter Birks came far closer to our shared understanding. He noted that the word could be used in many contexts and with quite different meanings, but at root every remedy had one thing in common: as noted earlier, it provided ‘a cure for something nasty’.⁶ This headline notion of remedies is preferable, because it leaves open the source of the remedy (the courts, statute, the parties’ own agreement), and whether the remedy is put in place before or after the nasty event.

It is this broadest possible conception of remedies that is adopted here. The chapters in this volume range across remedies delivered via the default rules of the law of contract, torts and unjust enrichment; it also includes those provided for by the parties themselves; and there is even a chapter on the remedies arising under criminal law, as well as certain other private law statutes. These various remedies may themselves be personal or proprietary, monetary or by way of specific relief, and they may be ordered by the court or obtainable through self-help. They may arise as a result of statute, common law default rules, or contractual provisions adopted by the parties themselves. All contribute to the landscape of commercial remedies.

A proper understanding of all these remedial responses is enormously illuminating. It often reveals the nuances of previously imperfectly understood rights and obligations. This volume aims to contribute to that endeavour. The focus is exclusively on remedies in the commercial sphere, where disputes involve commercial parties, not consumers. Commercial parties receive less paternalistic protection from statute; they appear to be given greater leeway in settling the terms of their engagements; and, finally, assessments of remedies can generally take place without concern for the

⁴ One of its most vocal advocates was Peter Birks. This taxonomy underpinned much of his thinking about private law. See in particular Birks (n 2).

⁵ See various writings of Stephen A Smith, especially ‘Duties, Liabilities, and Damages’ (2011–12) 125 *Harvard LR* 1727.

⁶ Birks (n 2) 9, with the various meanings of the word ‘remedy’ considered at 9–17.

reality of consent to the engagement itself or for the potential domestic fallout when remedies are ordered. Of course, commercial parties differ widely in their sophistication. We have not concerned ourselves directly with that issue, although occasionally its ramifications emerge in discussions of particular types of remedies.

In pursuing our examination of all this detail, what becomes clear remarkably quickly is that, despite the enormous number of commercial deals which take place, and the years of effort in refining the rules on remedies, so much still remains contested. It was for this reason that a symposium on commercial remedies was organised by the Cambridge Private Law Centre in July 2015 to encourage rigorous doctrinal and theoretical analysis of the issues. This volume is the result of that endeavour.

The goal was not to write a textbook on legal remedies. It was to focus on current controversies, and do so across the full range of remedies in commercial law. The idea was for each author to subject a particular issue to penetrating and critical examination, and then for those early assessments to be shared in discussion amongst the authors themselves, with the assistance of a number of practitioners and judges. All the chapters presented here have been revised in the light of that useful and challenging discussion, and occasionally also in light of new input from the courts. Although the focus of attention was exclusively on areas of controversy, the result is a remarkably comprehensive coverage of the field of commercial remedies. That in itself merits comment. It may at first seem a damning indictment of the state of the law, but if remedies are as important as we believe them to be, then it is not surprising that they are contested, nor is it surprising that they must evolve to meet changing commercial demands. The true test of the success of the English jurisdiction is not so much that its remedial rules are clear and settled, but that they are clear and sufficiently flexible to meet the developing needs of the parties relying on them. But clarity is key, and here there is undoubtedly work to be done.

Nevertheless, something more is clearly at stake in this area. The controversies discussed here have not arisen because the law is struggling to contend with fast-moving commercial needs. Indeed, the foundational principles of commerce have been remarkably immutable. What does change is the subject matter of the dealings, the nature of the counterparties, the process of engagement, and the global reach of the endeavour. But commercial parties still make much the same demands of the legal regime which supports their endeavour as they always have: clear rules of

engagement to determine when promises become binding; efficient and effective rules on interpretation where there are disputes over what was agreed; sensible rules on variation, waiver and dispute resolution; and finally, and perhaps most importantly, default rules, including default rules on remedies, to address the practicalities when the contract is silent. Given these rather stable requirements, why, it might be asked, is the remedial landscape still so beset by uncertainties and controversies? As noted earlier, it is suggested in this chapter that the instability is driven primarily by the drive to pragmatism, the challenge of conflicting foundational principles, and the practical difficulty of balancing competing but equally important goals in a compelling and satisfactory manner. Each of these sources of uncertainty and contention continue to infect and unsettle all aspects of remedies. The result is a landscape shot through with instances where it seems that pragmatism overrides doctrine and principle, discretion weakens rights, and muddled analysis risks weakening all.

1.3 The Drive to Pragmatism

Pragmatism is unavoidable. In the arena of commercial remedies it comes in various guises. Perhaps the first pragmatic driver in developing an attractive legal regime and providing individual remedies is an understanding that the law exists to support and serve society, here the commercial community, and must necessarily mould itself to meet their needs and expectations.⁷ Obviously such needs and expectations do not necessarily all pull in the same direction. Tugging in one direction is the demand from commercial parties for a legal regime which is clear, simple and predictable. If the law responds pragmatically, then in this instance it will be well aligned with the approach advocated by those preferring to focus on headline principles underpinned by rigorous doctrinal theory, and with clear rules of operation. True, the particular principles in issue might well be shaped in different ways by each group, but the structural outcome is one which ought to suit both pragmatists and theorists. Morgan in his chapter argues for developments in the field of commercial remedies to be in this direction, in particular starting with commercial expectations and only then reasoning from these to appropriate legal rules and principles, not the other way around. Merrett, too, makes the

⁷ David Campbell, 'Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation' (2014) 130 LQR 526.

important point that an increasing number of commercial transactions are now global, and if the law is to be intelligible across national boundaries then it is essential to have clear and stable rules which can be articulated intelligibly to those outside the common law legal castle.

This particular seam of pragmatism would thus seem to be perfectly aligned with the aspirations of the camp preferring to adopt stable and unambiguous overarching principles underpinned by clear-cut rules. However, although this described alignment is accurate in theory, the practice is judicial reluctance – and perhaps quite properly so – to do anything which smacks of radical change to existing rules, sometimes seemingly regardless of how compelling are the arguments from both principle and pragmatism.⁸ No doubt this approach renders the law more stable, but it also renders it more hidebound. Which is worse is sometimes debatable.

But pragmatism can also work in other ways. If remedies are truly to provide a cure for something nasty, then the particularities of the situation must be brought into play. These realities include consideration not only of what remedy is available, but also how it can best be obtained. This can sometimes lead to counter-productive or counterintuitive outcomes. Most obviously, if the potential benefits of litigating are outweighed by the risk of a failed claim and its associated legal costs, then parties are likely to be left without a practical remedy, no matter what their legal rights might suggest to the contrary. This is pragmatism writ large, and is not discussed in this volume. However, the search for alternative and better means of protection of rights and recovery of remedies is a constant one, and Dyson and Jarvis's chapter reminds us that assistance can come from unexpected quarters. Their chapter highlights the potential personal advantages to commercial parties of various remedies which are sought and obtained through the criminal courts at the instigation of public officials rather than the parties themselves. This of course has advantages and disadvantages, and their chapter discusses the pragmatic use of such opportunities to best effect.

In the same vein, pragmatic assessments of the likely success in litigation will also need to pay regard to matters of proof, both proof of causation and proof of quantification. Much of the remedial framework

⁸ Lord Robert Walker, 'Developing the Common Law: How Far Is Too Far?' (2013) 37 *Melbourne ULR* 232. See, e.g., the approaches in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 (not discussed in this volume, but illustrative in this context); and *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172.

of commercial law (and perhaps all law) is built on the need to prove actual facts and probable facts, and actual causation and probable causation. It is on such matters that compensatory and other varieties of damages claims are built. This creates enormous practical problems. A number of these are highlighted in Kramer's chapter on proving contract damages and the significance of presumptions. He suggests that in practice the most important legal principles in this area are not those concerning remoteness, mitigation or causation, but what he calls the 'messy and largely unappealable' business of proving the 'what if' question: i.e. what would have happened had there not been a breach of contract? This crystal ball gazing is given pragmatic assistance by the law's recognition of certain presumptions. But this in itself raises another issue for the remedial landscape: what is the reasonable and proper boundary between proof and presumption? Where should the line be drawn in order to provide reasonable legal rules for the protection of both parties to the commercial deal?

In this area of proof, not every problem is a practical one. There are occasions where the law has tied itself in knots over issues which might have been better resolved by a clear eye to exactly what facts (or causes or consequences) require proof, and why. If this is not done, then terrible muddles are likely. Green's chapter on lost chances makes the point that loss of a chance is a legitimate form of damage, but a lost chance of a successful legal action is not. In drawing that clear distinction and then pursuing its logical consequences to their inevitable ends, Green manages to cut through a confusing body of existing case law to extract clear and defensible principles. Even when pragmatic choices must be made, they are invariably best made against a backdrop of clear legal principle. The rule of law would be set at naught if this were not so.

All this talk of pragmatism would seem to lend support to the intuition of Oliver Wendell Holmes, that '[t]he life of the law has not been logic; it has been experience',⁹ an idea perhaps put more elegantly and forcibly by David Ibbetson, at least so far as it applies to the issues of concern in this volume:

Law cannot be treated purely as an intellectual system, a game to be played by scholars whose aim is to produce a perfectly harmonious structure of rules. It is something which operates at a practical level in society, and has to be understood as such.¹⁰

⁹ Oliver Wendell Holmes Jr, *The Common Law* (Little & Brown 1881 or Macmillan 1882) 1.

¹⁰ David Ibbetson, 'Comparative Legal History: A Methodology' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies*

But that ‘something which operates at a practical level in society’ also has to define a legal regime which will operate according to the rule of law. In particular, like cases must be treated alike. The challenge is obvious. Meeting the challenge requires a clear, robust and rigorous understanding of the relevant legal principles so as to ensure that their core underpinnings are adhered to, yet an understanding which is sufficiently nuanced to enable appropriate application in a variety of contexts. Many of the modern controversies surrounding commercial remedies reflect shortcomings on this front, and most chapters devote at least some pages to the issues.

All of this begins to sound as though the landscape of commercial remedies is enormously complex, and the terrain exceptionally rocky. In the face of that, a good map is much to be desired. But what sort of map will best serve the needs of the various stakeholders? High-level principles are all very well – and indeed essential – but as in so many areas of life, the devil really is in the detail. Nevertheless, that detail can be constructed far more thoughtfully and effectively if a clear overview of the issues to be dealt with is to hand. Civilian jurisdictions provide this map by way of civil codes. American lawyers have their restatements. And across European and international boundaries there are model laws, perhaps rather more effective in alerting us to our differences and enriching our understandings than in providing a model code designed to govern real commercial practice, but useful nevertheless. In England, we have little to match any of this.¹¹ Some universities still teach Roman law precisely to provide novice lawyers with an intelligible overview of a complete legal system. Designing an equivalent means of overview for the legal regime of a complex modern society is difficult, but in this volume Andrews’ chapter addresses the possibility of a code governing commercial remedies, and proposes a range of essential elements.

Perhaps from all of this it is obvious that a healthy degree of pragmatism is essential in framing a workable legal regime, especially in the commercial arena, but that there is also a deep-seated practical and

(Cambridge University Press 2012) 131, 135, and cited in Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36 UNSWLJ 1002, 1002.

¹¹ Of course there are statutes, but none to match the approach taken in civilian codes. And analogies to the US Restatements are now provided by Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) and Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press 2016).

theoretical need for clear foundational principles if the pragmatically conceived regime is to function according to the rule of law. It is to these foundational principles that we turn next.

1.4 The Challenge of Conflicting Foundational Principles

Moving from pragmatism to principle, it might be thought that any debate would be short. Legal principles are surely the foundation of any legal regime; they define and shape its structure. Without them it is difficult to apply even the simplest of rules to anything but the most straightforward of contexts.¹² Despite this, a number of foundational principles underpinning the commercial remedies regime remain deeply contested, and vigorously so. Several of the most significant are noted here.

1.4.1 *Party Autonomy vs Judicial Control*

Contracts are private arrangements. The promises made by one party to the other are entered into voluntarily. It is not difficult to see why a developed society would give legal recognition to these arrangements, and provide either judicial remedies or statutory remedies for breach. But even with this supplementary court-ordered input, the very context suggests that party autonomy should be sovereign. In particular, it might be assumed that the parties themselves would be able to decide which obligations they are prepared to undertake, and the conditions and contingencies surrounding them. Yet many of the most controversial areas of commercial remedies are those which address the issues arising when just these sorts of private arrangements are put in place. Notwithstanding the fully informed agreement by both sides, nor the inability of the courts to articulate the particular problem they seek to redress, many of these arrangements risk court bans or restrictions on their operation. This looks all the more odd when the same courts are at pains to stress that the parties remain free to settle their primary obligations; the concern is only with obligations which are remedial.¹³ It seems doubtful that the line between ‘right’ and ‘remedy’ can be defined with the necessary clarity to invoke such a discriminatory rule,¹⁴ but without

¹² *Makdessi* (n 8) [3].

¹³ See Mark P Gergen, ‘A Theory of Self-Help Remedies in Contract’ (2009) 89 *Boston University Law Review* 1397.

¹⁴ *Birks* (n 2).

any supporting rationale it is not at all clear why it is necessary to trouble over the distinctions in any event.

At its root, this opens up the general question of when the courts should be able to step in to curtail the freedom of the parties to determine the terms of their engagement, including specific remedial consequences. For Morgan, the courts' common law scheme of remedies should be regarded as a default regime, and one which (with limited exceptions) should be capable of modification by the parties themselves. Many other authors in this volume take the same line, favouring party autonomy and freedom of contract over judicial intervention and constraint. The issues emerge predictably with a vengeance in Part IV, dealing with agreed and party-specific remedies. Those authors coming down clearly on the side of party autonomy include Gullifer, Hooley and Worthington.

But not all authors are persuaded, and certainly not in all contexts. On the side of freedom of contract and party autonomy, Morgan speculates that the remedy of specific performance should be enforced whenever it is agreed by the parties, whether or not it would otherwise be available. This puts party autonomy centre stage as the principle having primacy in the area of commercial contracts. But Chen-Wishart provides a nuanced defence of the current rules, where specific performance is the exception even when ordered by the court, and the parties themselves would have no claim to including it as an enforceable term of their agreed engagement. Moreover, she does this by resort to a more subtle understanding of party autonomy itself, and not by resort to some superior overriding principle. There are lessons for everyone from the careful and detailed analyses in all these chapters.

1.4.2 *The Importance of Promises*

Commercial contracts involve promises. But where one party has failed to keep her promise, the default remedy is not that she should be compelled to perform her promise, but rather that she should compensate the other party for the failure to perform. From this it might be assumed that keeping promises is not one of the key objectives of commercial remedies. A number of authors take issue with this, at least without serious qualification. Webb, for example, in his chapter on performance damages, is at pains to distinguish between a party's interest in performance and the various specific or monetary remedies which might be awarded. He concludes that the legal duty on the defendant to perform does not necessarily disappear because the counterparty cannot